



After plaintiff failed to file a notice of substitution of counsel and the deadline for filing the joint stipulation had passed, an order to show cause (“OSC”) was issued on July 9, 2009. The OSC gave plaintiff until July 23, 2009 in which to show cause why this case should not be dismissed for failure to prosecute and comply with court orders. Plaintiff was directed to show cause by filing one or more declarations under penalty of perjury and supporting exhibits, if needed. The OSC cautioned plaintiff “that failure to respond to this order or to show good cause may result in the dismissal of this action with prejudice.” As of the date of this memorandum and order, plaintiff has not filed a response to the OSC.

### Discussion

A district court's authority to dismiss a litigant's action for failure to prosecute or to comply with court orders is well-established. See Fed. R. Civ. P. 41(b)<sup>1</sup>; Link v. Wabash R.R. Co., 370 U.S. 626, 629-630 (1962); Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.), cert. denied, 506 U.S. 915 (1992). “The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendar of the District Courts.” Link, 370 U.S. at 629-630.

In determining whether to dismiss a case for failure to prosecute or failure to comply with court orders, a district court should consider the following five factors: “(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” In re Phenylpropanolamine (PPA) Prod. Liability Litig., 460 F.3d 1217, 1226-1228, 1234-1252 (9th Cir. 2006)(discussing and applying those factors). Regardless of whether a litigant's conduct is most properly characterized as a failure to prosecute or as a failure to comply with orders, the applicable standard is the same. See, e.g., Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1138 (9th Cir. 2000) (failure to

---

<sup>1</sup> Rule 41(b) states:

Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19--operates as an adjudication on the merits.

1 prosecute), cert. denied, 523 U.S. 1007 (2001); Ferdik, 963 F.2d at 1260-1261 (failure to comply with  
2 orders).

3 The first factor—the public's interest in the expeditious resolution of litigation—“always favors  
4 dismissal.” Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002)(quoting Yourish v. California  
5 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), cert. denied, 538 U.S. 909 (2003); see In re PPA Prod.  
6 Liability Litig., 460 F.3d at 1234 (“[D]ismissal serves the public interest in expeditious resolution of  
7 litigation as well as the court's need to manage the docket when a plaintiff's noncompliance has caused the  
8 action to come to a halt, thereby allowing the plaintiff, rather than the court, to control the pace of the  
9 docket.”).

10 The second factor—the court's need to manage its docket—also favors dismissal. Computer Task  
11 Group, Inc. v. Brotby, 364 F.3d 1112, 1115 (9th Cir. 2004) (“Where a court order is violated, the first and  
12 second factors will favor sanctions . . .”); see Edwards v. Marin Park, Inc., 356 F.3d 1058, 1063-1066 (9th  
13 Cir. 2004)(noting that “resources continue to be consumed by a case sitting idly on the court's docket”).

14 The third factor—prejudice to defendants or respondents—also weighs in favor of dismissal. In the  
15 absence of a showing to the contrary, prejudice to the defendants or respondents is presumed from  
16 unreasonable delay. In re Eisen, 31 F.3d 1447, 1452-1453 (9th Cir. 1994)(citing Anderson v. Air West, Inc.,  
17 542 F.2d 522, 524 (9th Cir. 1976)). “Unnecessary delay inherently increases the risk that witnesses’  
18 memories will fade and evidence will become stale.” Pagtalunan, 291 F.3d at 643 (citing Sibron v. New  
19 York, 392 U.S. 40, 57 (1968)).

20 The fourth factor—the availability of less drastic sanctions—also supports dismissal. Plaintiff was  
21 warned that her failure to respond to the OSC could result in dismissal of this action with prejudice under  
22 Rule 41(b). See In re PPA Prod. Liability Litig., 460 F.3d at 1229 (explaining that “[w]arning [the plaintiff]  
23 that failure to obey a court order will result in dismissal can itself meet the ‘consideration of alternatives’  
24 requirement.”).

25 The fifth factor—the public policy favoring disposition of cases on their merits—weighs against  
26 dismissal, as it always does. Pagtalunan, 291 F.3d at 643 (citing Hernandez v. City of El Monte, 138 F.3d  
27 393, 399 (9th Cir. 1998)). Despite the policy favoring disposition on the merits, however, it remains a  
28

1 litigant's responsibility to comply with orders issued by the court and "to move towards that disposition at  
2 a reasonable pace, and to refrain from dilatory and evasive tactics." In re Eisen, 31 F.3d at 1452 (quoting  
3 Morris v. Morgan Stanley & Co., 942 F.2d 648, 652 (9th Cir. 1991)). Plaintiff has not fulfilled that  
4 obligation.

5 The five-factor test is a disjunctive balancing test, so not all five factors must support dismissal. See  
6 Valley Eng'rs Inc. v. Electric Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998)(noting that the five-factor test  
7 "amounts to a way for a district judge to think about what to do, not a series of conditions precedent" to  
8 dismissal), cert. denied, 526 U.S. 1064 (1999); Hernandez, 138 F.3d at 399 (explaining that dismissal is  
9 appropriate when four factors support dismissal or where three factors "strongly" support dismissal).

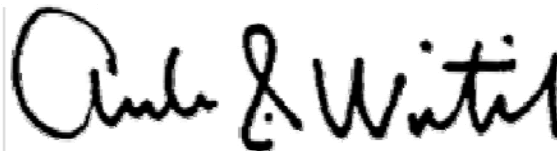
10 Prior to dismissal on the court's own motion, however, a pro se petitioner should be notified of the  
11 basis for dismissal and warned that dismissal is imminent. See Ferdik, 963 F.2d at 1262; West Coast  
12 Theater Corp. v. City of Portland, 897 F.2d 1519, 1523 (9th Cir. 1990). That requirement has been met.

### 13 Conclusion

14 For the foregoing reasons, this action is dismissed with prejudice for failure to prosecute and failure  
15 to comply with court orders.

16 **IT IS SO ORDERED.**

17  
18 July 28, 2009



19  
20 ANDREW J. WISTRICH  
21 United States Magistrate Judge  
22  
23  
24  
25  
26  
27  
28